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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 549

EDWARD KEELING,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

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In the Supreme Court of the United States

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No. _____.

EDWARD KEELING,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The petitioner, Edward Keeling, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the Eighth Judicial District of Cuyahoga County, made and entered by said Court on the 8th day of January, 1965 (a copy of which is attached hereto as Appendix I, *infra,* page 22).

The Ohio Supreme Court refused further appellate review, which entries are attached hereto as Appendixes II and III, *infra,* pages 22 and 23. (Also, see _____ Ohio St. 2d _____ (April 14, 1965).) A Rehearing was denied by the Ohio Supreme Court on May 12, 1965, which entry is designated herein as Appendix IV (*infra,* page 23).

Thus making the judgment of the Court of Appeals final on that date—that is, May 12, 1965.

OPINIONS OF THE COURTS BELOW.

No opinions were rendered by the various courts in Ohio; hence, this cause is being presented from the posture that all the constitutional issues raised by the petitioners were resolved by the Ohio Courts against our contentions, and that the challenged judgment of the State Court does not purport to be based on independent State grounds. Also, that decisions on the federal constitutional questions were essential to the determinations made by that Court.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked under Title 28 U. S. C. A. 1257 (3), which section pertinently provides:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *, (3) by writ of certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the constitution."

This cause also involves the requirement of due process that a jury must be properly instructed as to the issues raised by an indictment and a plea of not guilty.

QUESTIONS PRESENTED FOR REVIEW.

I.

Whether "due process" is denied by a State Court where the jury is instructed that under the defense of entrapment the crucial test involves a determination as to the presence or absence of good faith on the part of the entrapping officer?

II.

Whether due process of law is violated when the trial court's instruction as to the defense of entrapment is clearly erroneous both under State Law federal constitutional rights to a fair trial?

III.

Whether Ohio's harmless error statute (*i.e.* R. C. of Ohio, § 2945.53) is constitutional if an intermediate appellate court is free thereunder to affirm a conviction, in spite of the errors, provided only that they are satisfied there is sufficient evidence to prove guilt?

IV.

Whether a State Appellate Court, while inferentially determining that errors did in fact occur during a criminal trial, can arbitrarily, and without any articulation, classify them harmless errors even though the errors assigned were contended to be violation of federal due process of law?

V.

Whether a State Court can, consistent with due process, affirm a conviction challenged on constitutional grounds, by resort to the ambiguous and equivocal judg-

ment entry that the "Court finds no error prejudicial to the appellant," which such conclusionary statement, dispositive of the appeal, does not afford any indication of the view taken by the Court as to the efficacy of a constitutional challenge?

VI.

Can a state appellate court consistent with due process, by resort to an omnium-gatherum entry to the effect that it finds no error prejudicial to an appellant, handicap one who must ultimately seek the vindication of his rights in the Federal Courts, which handicap results because such a determination does not expose whether the judgment involved purports to be based on independent state grounds, or whether a decision on the federal question was essential to such judgment?

CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES.

The Fourteenth Amendment to the Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATE OF THE PROCEEDINGS AT WHICH, AND MANNER IN WHICH, THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED.

The federal questions involved in this cause were initially raised, by the petitioner, at the trial level in the form of an objection to the instruction given the Jury on the issue of entrapment. It was contended, both in the trial court and in the Appeals Courts, that an improper instruction on the defense of entrapment, where entrapment is the sole defense, amounts to a denial of due process and of a fair trial.

In the Supreme Court of Ohio, upon the failure of the Intermediate Appellate Court to make any express findings, it was argued that an appellate court's ability to resist rendering formal opinions, where federal questions are involved, raised serious constitutional questions. Further it is now being contended, as was contended below, that the adequacy of Ohio's procedural bars to the assertion these federal questions involves an issue that ought to have been resolved by the Supreme Court of Ohio.

STATEMENT OF THE CASE.

(Numerals in parentheses refer to pages of the Bill of Exceptions.)

A. Nature of the Case.

Edward Keeling, the petitioner hereinafter referred to, was indicted for the crime of bribery (R. C. of Ohio § 2917.01). More specifically it was charged that on the 19th of April, 1963, the appellant did unlawfully and corruptly offer and give Five Hundred Dollars ($500.00) to one Bosie Mack, a member of the Cleveland Police Department, with intent to corrupt and influence him with respect to the performance of his duty as a police officer.

Following a trial by jury before the Honorable William J. McDermott, a Cuyahoga County Common Pleas Court Judge, the petitioner was found guilty and sentenced under the statute. In due season his Motion for a New Trial was denied and the appellant then perfected his appeal to the Court of Appeals, in accordance with the procedure in such cases made and provided, where the conviction was affirmed.

B. Statement of Facts.

I.

Bosie Mack, a detective, with the Cleveland Police (Narcotic Squad), testified that on the 16th of April, 1963, they had under arrest and in custody, one, Albert Hawkins in connection with the alleged violation of the State's Narcotic Drug Law (R. 7), also, he added that at the time he did not know the appellant personally, although he had seen him before on one or two occasions (R. 7).

Detective Mack then stated that "about 8:30 p. m. on April 18, 1963, I received a call into the narcotics office.

I happened to answer the phone, and a fellow who identified himself as 'Bud' said 'this is Bud' " (R. 8).

And "at that time he asked me if he could talk to me and I told him yes. I asked him what did he want to talk about. He said, 'Al Hawkins.' I said, 'What about him?' He said, 'I want to know if I could do him some good'."

"At that point I told him to hold it, I would call him back, to give me a number, to give me a number where he was at, and I would call him back" (R. 14).

Next, according to Detective Mack, he was given a number which he called about 8:40 and again talked to the appellant who said: "He wanted to do Albert Hawkins some good" (R. 15). In this same conversation the appellant was quoted as wanting to know whether or not they had a good case against Hawkins (R. 16), and when told they had a good case: "Then he said, then Mr. Keeling asked me if he could do him any good, and I said, 'Like how?' He said, 'Like get some money and get him out'."

"Then I asked him if he wanted to get him out on bond. I said, 'You can get him out on bond.' He said, 'No, I want to get him out of this mess,' he said" (R. 16).

Further, the Petitioner upon being asked if he was Hawkins' partner, or if he had any connection with Hawkins' narcotic arrest (R. 17), was quoted as saying "* * * he did not have anything to do with the narcotics that Albert Hawkins was selling, or anything of that sort, but he wanted to do his wife's cousin a favor, who was going with Albert Hawkins at that time. He then stated to me that he had $500.00. He said, 'I am not making any money now, but I have $500.00 that I can lay my hands on' " (R. 18).

The officer then stated he continued to engage the appellant in conversation, and later "informed Mr. Keeling that $500.00 was not enough." This conversation sup-

posedly was concluded with Keeling giving the officer his home number, and requesting the officer to see if he couldn't get the thing done for $500.00; whereupon, Mack said he would need an hour to work on them (R. 19).

Later Detective Mack indicated he did call the appellant at his home (R. 22), but on that occasion the appellant was incoherent (R. 23), which was due to his being under the influence of alcohol.

On the 19th of April (the next day) the appellant is supposed to have again called the narcotics office. As to this Detective Mack testified, in substance, that after learning it was the petitioner, he asked him to leave a number where he could be located (R. 24), which number he later called and had a conversation with Keeling.

As to the content of this alleged conversation the following excerpt conveys the officer's versions of the facts:

> "Q. What happened at that particular time? What conversation did you have with him?
>
> A. Then he asked me if I could do anything with that thing, or could I do the boy any good, at which time I told him I didn't know. So then he asked me if any—
>
> Q. Speak up.
>
> A. He asked me if anything could be done, and again I said, 'I don't know.' So then Mr. Keeling said, 'Well, look, I have got $500.00. That is all the money I have in the world, and I will turn this money loose if I can get the man back on the street. I want him on the street.'
>
> Q. Speak up.
>
> A. He asked me if anything could be done, and again I said, 'I don't know.' So then Mr. Keeling said, 'Well, look, I have got $500.00. That is all the money I have in the world, and I will turn this money loose

if I can get the man back on the street. I want him on the street.'

At that point I asked him again what did he expect for his money, and he says, 'Just put Albert Hawkins out on the street free and clear.'

Q. What further conversation did you have with him then?

A. Then I asked him, I said, 'where are you now?' He said, 'I am at my sister's.' I said, 'Oh, on 83rd? and he said, 'Yes.' Then I said, 'Well, I can't come out there.' Then he says, 'Well, where can I meet you?' I says, 'Oh, make it Woodhill Park, some place out like Woodhill Park' " (R. 27).

Following these arrangements the evidence bears out the ultimate preparations made by the police. And the testimony of various other officers, including Sergeant Robinson and Sergeant Miller, brought out the fact that pictures were made and conversations recorded of the transactions that later took place at the park.

Despite all the testimony that was rendered on these points the only crucial testimony was rendered by Detective Mack, who added they had actually arrested Albert Hawkins on the 16th of April, and at that time they knew they had a good case against him (R. 51), but that, as of the time Keeling called on the 18th, "Hawkins (had not) been charged with the crimes that * * * [he had] been arrested for" (R. 51).

Also, and on cross examination, Detective Mack admitted that "During the first conversation he [the petitioner, Edward Keeling] had not made any suggestion that he would be willing to pay some money if he thought it could do some good" (R. 63). And that his real purpose in telling Keeling he would call him back was to see if "Mr. Keeling could tell me who Mr. Hawkins' supplier was" (R. 64), and to find out what his relationship was with

Hawkins (R. 64). As to these "purposes" the officer added that Keeling denied any knowledge of narcotics, and added that his sole interest was that "Hawkins was a boyfriend of his wife's cousin" (R. 64).

The officer denied that the third purpose was to lure him into making some sort of overture with reference to paying money to help Albert Hawkins (R. 64, 65).

Despite this denial, and the officer's testimony that he did not attempt to lure the appellant into the belief that money might benefit Hawkins, the following segment of the record suggests the contrary is true:

> "Q. So that is a fact that the first conversation about $500.00 not being enough was initiated by you?
>
> A. Yes, I told him it was enough.
>
> Q. And it was after you told him that, that he told you to talk it over with your partner?
>
> A. Yes.
>
> Q. So that you initiated the conversation about money in excess to $500.00?
>
> A. I told him it wasn't enough.
>
> Q. Didn't you intend that he should get from that that he needed more money?
>
> A. If he had come up with a thousand dollars, it wouldn't have been enough.
>
> Q. I understand that, Mr. Mack, but when you told him that $500.00 was not enough, didn't you intend that he should infer from that statement that he should make an offer of a sum in excess to $500.00?
>
> A. No, that was not our intention.
>
> Q. Then why didn't you just tell him that there is nothing money can do to help him?
>
> A. Because we were trying to find out if Mr. Keeling was putting up the money, or if Mr. Hawkins' supplier was putting up the money." (R. 70, 71.)

II.

According to the petitioner's evidence, his wife's cousin, who had visited Hawkins in jail, told him to get in touch with Detective Mack—which is why he made the first call. And that during his first conversation with the Detective, he (Keeling) stated that he was interested in Hawkins, and wanted to help him; whereupon, the Detective added that they had Hawkins up tight and that it would "take a lot of money to get off this" (R. 252-253). Petitioner testified this provoked the following response: "Well, I ain't got any money. I know I can put my hands on Five Hundred Dollars." And that this is when Mack said "give me a number and I'll call you back." (R. 253.)

When this return call was made, Keeling again added he only had the $500.00, which was said not to be enough. Next, on the following day, when Keeling again called Mack, arrangements were made for them to meet in Woodhill Park, after Keeling added "I still got the Five Hundred, I can't get no more than Five Hundred." (R. 253-256.) This money the petitioner indicated he had earmarked to fix the gutters on his home (R. 293). He further added that "When I got to Woodhill Park, he asked me did I have the money. I say, 'No,' I say, 'I ain't got the money on me,' you know, went in my pocket to show him I didn't have money—'but I live right up there. It won't take me no time to get the money.'

"So he said, 'Okay, I'll wait till you come back.' So I jumped in the car, straight out Park Hill. This drawing is wrong. Parkhill runs—where we were parked from you can go straight into Parkhill, straight into my house, you know, up through Southington, and come right back out."

And when asked, "How long did it take you to go home?" he testified: "It didn't take me five minutes, didn't take that long" (R. 256).

According to further evidence, it was after his return from home that he gave this money to the Detective.

As indicated above, the balance of the State's evidence related to the extensive use made by the Cleveland Police of wiretapping and other electronic eavesdropping equipment. These officers also developed the elaborate preparations that were made to keep the area in and around the park under surveillance during the time that the petitioner and Detective Mack were to be present, for the anticipated exchange of the money. And, as planned by the police petitioner was lured into giving this money to the officer. As proof of their effectiveness, when this was done, they apprehended him immediately. Not only this, but in further acting out their plot these other officers even feigned an arrest of the detective, which act included placing both petitioner and Mack in the same vehicle and in cuffs.

Based on the above evidence the question for the jury was, in this case, a close one. The defense of entrapment was sought to be maintained. In this regard, it was our contention that Detective Mack incited, induced, instigated or lured the petitioner into committing a crime that he would not otherwise have committed. As to this question, the defense, before argument, submitted to the Court and requested that the Court give to the jury the following special instructions:

> "If the jury believes that Detective Mack incited, induced, instigated or lured the defendant into committing a crime which he would not otherwise have committed, then under the circumstances the defendant is to be acquitted, not because he did not do something wrongful but because he was induced to do a wrongful act which he would not otherwise have done.
>
> "And as jurors, you are to ask yourself whether in fact on the evidence you heard you are persuaded by

the preponderance of that evidence that Detective Mack created the crime and the temptation, and he, Detective Mack, was the instigator and author of a crime that would never under any circumstances have taken place, had he not used unfair means." (R. 326-326A.)

This request was refused (R. 326A). On the other hand, in his general charge, relative to the defense in entrapment, the Court used the following language to which an exception was duly noted:

"In this case, if the intent to commit the offense here charged originated in the mind of anyone who sought to entrap the defendant, Edward Keeling, and to lure him into commission of the crime merely for the purpose of arresting and prosecuting him, then you cannot find the defendant, Edward Keeling, guilty.

"It is the law, however, that an officer, having reasonable ground to believe that the law is being violated, and *acting in good faith with a view of detecting crime,* he may set a trap. He may employ a decoy to secure evidence against a person who had the intent and design of his own accord to commit a criminal offense, and who, in fact, does commit the essential acts constituting it.

"If, by a preponderance of the evidence here now, the greater weight of the evidence, you are convinced that the defendant, Edward Keeling, was an innocent victim of entrapment, as the law has defined that term, then you could not find him guilty.

"On the other hand, *if you are convinced that the police were acting in good faith in an effort to detect crime,* and that the trap set by them was proper and lawful, in view of the court's instructions on the subject, then you may dismiss the defense of entrapment from your minds, and proceed to determine whether the defendant is guilty of the crime charged." [(R. 341-342) Emphasis supplied.]

An exception was noted to this charge by the Court, which included the Court's refusal to state the law as correctly stated in the special request. The verdict of the jury was then rendered; hence, the appeals followed.

ARGUMENTS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

There was no issue in this case as to whether or not money was in fact given to the detective. The defense of entrapment, relied on by the defense, conceded this fact. More, specifically in defending against these facts it was theorized, by petitioner either (1) that the offense charged against him was not one of a nature to be recurrent or habitual, and that the detective was not merely putting before him an additional occasion, such as a regular situation would present, to commit this crime, but did in fact generate a distinct temptation which operated to induce the original intent in the mind of the petitioner. Or (2) that the idea was originally the detective's who incited, induced and/or lured the petitioner into the commission of an offense that he would not have otherwise committed.

Of course the law in the area of entrapment is not without its confusion. See, *Sherman v. United States,* 356 U. S. 360 (1958). However, at least this much is clear: When the criminal intent originates in the mind of the entrapping person, and the accused is lured into the commission of the offense charged in order that he may be prosecuted therefor, the defense of entrapment can be maintained and no conviction can be had. This is so because the purpose of enforcement agencies, such as our police, is not to solicit the commission of, nor create, an offense. Their duty, in such regard, is to ascertain if the suspect is engaged in an unlawful business, or to entrap

him in the act of committing an offense which such officer has reasonable grounds to believe the accused has committed, or is about to commit. 15 *Ohio Jur.* 2d, Criminal Law, § 245. Cf. *Sorrells v. United States,* 287 U. S. 435 (1932); *Sherman v. United States, supra.*

Relevant here, the defense of entrapment has been expressly approved in a number of Ohio cases. In most of these the rule stated is that the defense of entrapment is available to an accused where he has been induced or lured, for the purpose of prosecution, into the commission of a crime which he otherwise had no intention of committing. *State v. Miller,* 85 Ohio App. 376 (1948); *State v. Langdon,* 52 Ohio Op. 403 (1954).

Essentially then "entrapment is even under the law in Ohio the conception and planning of an offense by an officer or other person and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the entrapper. Thus the question then, in this cause, was whether this petitioner was induced to perform the unlawful act of "bribery" or whether he was apprehended by lawful artifice in the execution of a criminal act of his own conception. In determining this question proper consideration should, perforce, be given not only to the conduct of the officers, but also that of the defendant, including evidence regarding his predisposition to commit the crime involved (that is, bribery).

If the jury had believed that Detective Mack incited, induced, instigated or lured Edward Keeling into committing a crime which he would not otherwise have committed, then under the circumstances as a defendant he was entitled to be acquitted, not because he did not do something wrongful, but because he was induced to do a wrongful act, which he would not otherwise have done.

I.

The most salient issue posed by this cause is whether the Court correctly stated the applicable law in its instruction on entrapment insofar as it imposed on the defense the burden of proving that the entrapping officer did not act "in good faith." The special instruction submitted to the Court would have required the jury to consider this defense by a different standard. And if that standard was correct, then the petitioner is at least entitled to a new trial.

Surely there can be no doubt that the issue of entrapment ought not, and does not depend on whether the detectives acted in good faith, which was all the Court's charge required. In assessing the gravity of this contention, consider, by way of analogy, that police officer could honestly, and with all sincerity believe that it was necessary to confine and interrogate a suspect for days in order to crack his story, but this would not be permissible. (*Haynes v. Washington,* 373 U. S. 503), nor will unrestrained searches and seizures be permitted because the police believe they are necessary to law enforcement (*Mapp v. Ohio,* 367 U. S. 643). A claim of entrapment should be considered no different.

In any event the limits of permissible police conduct are not to be defined by the "good faith" of the officers, but by the standards of fairness and decency. But that is not all to require that a defense of entrapment can be maintained only by proving that the officers lacked "good faith" is to require that an accused assume the burden of proving himself not guilty and exposes his defense to a higher standard then ought to have been required.

Again, the real contention of the petitioner was that Detective Mack inveigled, incited and induced him into committing the acts charged, the design to commit having

originated with the Detective, and not with him. Also that the Detective facilitated its commission by luring him by stealth and strategy into actually giving the officers the $500.00 under the false assumption that such was required if he (the petitioner) really wanted to help his friend (Albert Hawkins). Thus when we admit that there was this conflict in the evidence as to whether the criminal design originated with the officer or with the petitioner (and the reasonable minds could differ on the point), a proper resolution of such issue required accurate instructions as to the applicable law. The failure to properly submit such issue to the Jury tantamounted to a denial, in our judgment, of a fair trial.

This point is particularly important in view of the fact that the petitioner, as a witness in his own behalf, had made the distinct claim that he was so lured and persuaded into the act charged herein. The officer's testimony, on the other hand, was that he deliberately engaged the petitioner in conversation, but for the purpose of trying to find out if he was involved in the offense for which Albert Hawkins was going to be charged; *i.e.*, a Narcotic Law Violation.

This much is certain, here there had not been an existing course of conduct as would suggest a proneness on his part to commit this particular crime, nor was this a case where he (the petitioner) had already formed a design to commit this particular crime or a similar crime. Cf., *United States v. Becker*, 62 Fed. (2) 1007 (2d Cir. 1933).

With these factors in mind, it is earnestly urged that a proper instruction was required as a matter of due process. The instruction given being clearly erroneous; so much so, that a new trial is indicated as a result of this point alone.

II.

Irrespective of the Court's disposition on the above point, under the evidence, even if analyzed on the basis of the "erroneous" instruction, the verdict was clearly against the weight of the evidence and/or insufficient to support this conviction as a matter of fundamental due process. *Thompson v. Louisville,* 362 U. S. 199 (1960).

In making this argument consider the Trial Court's instruction that the chief test for the defense of entrapment was a determination as to in whose mind the intent originated. If this test means what it says, then the petitioner ought never have been convicted. This is so because there was not even an indication that he had ever engaged in any bribery, or attempted bribery; or any evidence that the officers knew of any type of conduct on his part as would suggest a willingness to engage in such an activity. Such being the case there is almost the tendency to feel that entrapment as a matter of law ought to be presumed in the absence of some evidence on these points. However, where, as here, the officer admits that he did not even know the person involved, is it not stretching credulity too far to say that one would call a policeman, who was a stranger, over the telephone and offer him some money to benefit one who is no closer to him than an acquaintance?

III.

Unfortunately in too many criminal appeals the appellate courts, especially the one in Cleveland, fail to analyze in the form of articulated opinions the frequently recurring issues being raised in the increasing number of such appeals. In our judgment, this type of superficial treatment of appeals (that is, by disposing of them on an Ad Hoc basis by resort to omnium-gatherum en-

tries) is responsible for the numerous precedent voids not existent in the State of Ohio.

Surely it cannot be denied that the doctrine of entrapment involves a number of important aspects. Even the nature of the defense itself is confusing, to say nothing of the serious question whether the issue of entrapment is to be decided by the Court or the jury. Yet, the Ohio Court of Appeals, in this cause, ignored the opportunity to assist the trial judges and attorneys by setting forth its understanding of the law of entrapment. Certainly, it cannot be said that the law is so well known, or that the issues are so elementary that any further explanations would be surplusage.

Moreover, involved in this appeal, considered by the Appellate Court, was a precise instruction by the Trial Court that in assessing the entrapment defense the "good faith" of the officers was significant. The effect of this instruction, if erroneous, cannot be denied. The issue as to whether such instruction is proper is apparently one of the first impression in our State. At least counsel for the State did not, before the Court of Appeals, urge any case authority in support of the instruction.

As a result of the Court treating this appeal on an Ad Hoc basis, the question is still an open one. And, if this were not enough, other courts may view this case as expressly approving what may very well be an erroneous instruction. Thus, it is from this posture, and with all deference to the Courts below, that we urge that their failure to definitely resolve the issues herein was such an abuse of discretion as to amount to a denial of Due Process.

Further, we urge that at the very least this Court ought not leave this petitioner imprisoned on the basis of a sentence that may not have been arrived at in accordance to the correct standards for the determination

of guilt. More importantly, this Court should not exclude, nor should the Ohio Courts have excluded, the possibility that if the jury had been properly instructed they would have arrived at a different verdict.

CONCLUSION.

In our judgment, the failure of the Ohio Court of Appeals to make express findings necessarily creates a doubt of constitutional proportions as to whether or not the petitioner has been accorded Due Process. Further because one cannot ascertain whether the Court of Appeals found the law adversely to the petitioner's contentions, since, in this cause, the Appellate Court's judgment purports to be based on the harmless error statute; the possibility that even this conclusion was arrived at by the influence of an erroneous standard of law poses a novel question of constitutional dimensions. Of course, the possibility of such a legal error could have been eliminated if the Court had articulated the standard that was applied by them. On the other hand, based on such conspicious failure, this case presents at least an arguable doubt as to whether the correct standard, by which the defense of entrapment ought to have been gauged, was (1) given to the jury, or (2) was applied by the Court of Appeals, in their respective determinations of the merits of this cause.

Therefore, bearing in mind the responsibility of State Courts to administer the concepts of Due Process, there should be no necessity for an accused to assume what must have been the basis for a judgment, as perforce must be done where there has been no articulation of the standard applied. Furthermore, where, as here, it cannot be reasonably certain that in affirming a conviction the appellate court disapproved the contentions made (by a specific ruling that any errors assigned were not well

taken), and where the issues of law and due process, generated thereby, present novel problems for decision (*e.g.*, the correct instruction on the law of entrapment) any hypothesis as to the sufficiency of credible evidence to sustain the conviction involves the purest speculation. So much so, that the real fear exists that this conviction cannot pass muster by the due process and equal protection standards of the constitution.

A fortiori, due process is similarly denied when a State Court, by its failure to delineate, or articulate, the basis for its disposition of an appeal to it, creates an added handicap for one seeking an appellate determination as to whether his federal constitutional rights were compromised. This must be so where, as here, the mere indication that such constitutional rights were considered and resolved against him, the avenue to a further, possibly more meaningful review, would at least be more easily accessible.

For the foregoing reasons it is therefore respectfully requested that a Writ of Certiorari be issued under the seal of this Court to the Court of Appeals of the Eighth Judicial District of Ohio (Cuyahoga County) to the end that the judgment of that Court may be reviewed and reversed.

JAMES R. WILLIS,
Attorney for Petitioner.

APPENDIX I.

JOURNAL ENTRY OF THE COURT OF APPEALS.

(January 8, 1965.)

This cause came on to be heard on the appeal on questions of law from the judgment and sentence of the Common Pleas Court and was argued by counsel for the parties; and upon consideration, *the court finds no error prejudicial to the appellant* and therefore the judgment and sentence of the Common Pleas Court is affirmed and it is ordered that appellee recover of appellant its costs herein taxed.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution. Exceptions.

KOVACHY,
Presiding Judge.

APPENDIX II.

ORDER OVERRULING MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS.

It is ordered by the Court that this motion is overruled.

APPENDIX III.

ORDER DISMISSING APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY.

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein.

APPENDIX IV.

ORDER DENYING MOTION FOR REHEARING.

It is ordered by the Court that rehearing in this case is denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 549.

EDWARD KEELING,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION.

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals for the Eighth Appellate District of Ohio and in the Ohio Supreme Court. The Court of Appeals affirmed without writing an opinion and the Ohio Supreme Court refused to certify and review.

The Ohio courts decided this case in accordance with the statutes of the State of Ohio, and in accordance with the Constitution of the United States and applicable decisions of this Court. The decisions of the state court were based on state law. There is therefore no substantial federal question involved.

QUESTION PRESENTED.

Petitioner claims he was deprived of his liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States in that (1) the trial court erred in instructing the jury on the law of entrapment, (2) the Ohio appellate court did not render an opinion setting forth the court's reasons for affirming the judgment of the trial court.

THE STATE'S EVIDENCE.

In April 1963 Detective Bosie Mack was assigned to the Narcotics Unit of the Cleveland Police Department. Pursuant to his official duties, Mack, along with other officers, arrested one Albert Hawkins for a narcotics violation. Subsequently Hawkins was charged with selling narcotics, a felony.

It is not disputed that on April 18, 1964, shortly after Hawkins was arrested, Edward "Bud" Keeling, the petitioner herein, called Detective Bosie Mack at Central Police Station. Keeling was known to the Narcotics Unit and to the police department in general as a clearinghouse operator and a member of the underworld. He admitted on cross-examination that he was twice convicted of burglary and that he is a clearinghouse operator. Detective Mack described his conversation with Keeling in the following at R. 14:

> "At that time he asked me if he could talk to me, and I told him yes. I asked him what did he want to talk about. He said, 'Al Hawkins.' I said 'What about him?' He said, 'I want to know if I can do him some good.'
>
> "At that point I told him to hold it, I would call him back, to give me a number, to give me a number where he was at, and I would call him back."

A little later they talked again, and the detective described what happened then in the following at R. 16:

> "Then he said, then Mr. Keeling asked me if he could do him any good, and I said, 'Like how?' He said, 'Like get some money and get him out.'
>
> "Then I asked him if he wanted to get him out on bond. I said, 'You can get him out on bond.' He said, 'No, I want to get him out of this mess,' he said."

The first mention of money was in that same conversation (R. 18). "He then stated to me that he had $500.00. He said, 'I am not making any money now, but I have $500.00 that I can lay my hands on.' "

There was another conversation the next day between Detective Mack and Keeling, which the detective related in the following at R. 26:

> "He asked me if anything could be done, and again I said, 'I don't know.' So then Mr. Keeling said, 'Well, look, I have got $500.00. That is all the money I have in the world, and I will turn this money loose if I can get the man back on the street. I want him on the street.'
>
> "At that point I asked him again what did he expect for his money, and he says, 'Just put Albert Hawkins out on the street free and clear.' "

At this point it is apparent that if and when any money passed, it was for the purpose of influencing Detective Mack to corruptly release a prisoner in custody for a narcotics violation solely in consideration of a payment of money by Keeling. The detective testified:

> "He stated he wanted Mr. Hawkins cut out, no indictments, no prosecution, nothing, just out on the street, free and clear, and that he was—and that Hawkins was going to be messing around, so he asked that we didn't bust him until after he got his money back."

In connection with narcotics "messing around" usually means a person either selling or using narcotics. A "bust" is an arrest.

At R. 286, under cross-examination, the defendant substantiated the detective's testimony that the money did pass from him to the detective.

> "Q. That is the way you had that money assorted, in fifty and one hundred dollar bills?
>
> A. Let me see. Yes, that is right. I guess—I don't know. It's been so long since I seen it.
>
> Q. What did you have that money saved up for?
>
> A. Fix my house."

The money changed hands on April 19th at about noon, following another phone conversation between Detective Mack and Keeling in which it was arranged that they should meet at an appointed spot in Woodhill Park in Cleveland. Keeling said he did not have the money with him but would go home to get it. He left and returned in a few minutes, after which he stated his terms to the detective as above quoted, then handed the detective a wad of folded bills, which the detective put in his left pocket. At that point other officers who had the transaction under surveillance appeared and arrested Keeling.

Of importance in this case is the statement of Keeling (St. Ex. 24 and 24A), part of it in narrative form and part consisting of questions and answers. The narrative portion relates that mention of money was initiated by the defendant:

> "* * * I told him, 'I know that it's gonna take some money, I got five hundred dollars.' He asked me where I was at and then he said, 'I'll call you back.' "

ARGUMENT.

The petition for a writ of certiorari sets forth a number of questions presented for review, which can be summarized as follows: (1) Error in the charge of the trial court on the law of entrapment; (2) that the petitioner's constitutional rights were violated when both the Court of Appeals for the Eighth Appellate District of Ohio and the Supreme Court of Ohio affirmed the judgment of the trial court without rendering any opinion giving the reason for such affirmance.

(1) The question of entrapment as a defense to a charge of crime in a state court is a matter of law, to be determined by the law of the state on that subject. This is purely a legal question, involving the legal definition of a legal term. In this case the question was reviewed by both the appellate court and the Supreme Court of Ohio and the court's charge on entrapment was found to be consistent with the Ohio law and the decisions of the federal courts. The petitioner herein declares that the determination of the Ohio courts on the law of entrapment constitutes a violation of petitioner's constitutional rights. Under our federal regime, state courts, state agencies, and state legislatures are the final expositors of state law. *Brady v. Maryland,* 373 U. S. 83, 10 L. ed. 2d 215, 83 S. Ct. 1194. This is not a proper subject for review by this Court for the reason that no constitutional or federal question is presented.

(2) The petitioner's claim of violation of his constitutional rights by reason of the failure of either the appellate court or the Ohio Supreme Court to render an opinion when reviewing this case has no foundation or support whatever. We are unable to find any case that requires every reviewing court to write a full and complete opinion

in every case presented to it for review. Moreover, this is a matter of state procedural law and presents no federal or constitutional issue whatever.

There is neither any substantial federal question nor any debatable constitutional question involved in either of the petitioner's claims of error. This Court has many times held that a real and not a fictitious Federal question is essential to the jurisdiction of the Supreme Court of the United States over the judgments of state courts.

Caldwell v. Texas, 137 U. S. 692, 11 S. Ct. 224;
Hamblin v. Western Land Co., 147 U. S. 571, 13 S. Ct. 353;
St. Louis G. & F. S. R. Co. v. Missouri, 156 U. S. 478, 15 S. Ct. 443;
Charles v. McDacie, 165 U. S. 168, 17 S. Ct. 284;
Iowa v. Rood, 187 U. S. 87, 23 S. Ct. 49;
Illinois C. R. Co. v. Chicago, 176 U. S. 646, 20 S. Ct. 509;
Equitable L. Assur. Soc. v. Brown, 187 U. S. 308, 23 S. Ct. 123.

The mere averment of a Federal question is not sufficient to give the Federal Supreme Court jurisdiction of a writ of error to a state court, but a real question is essential. *Sawyer v. Piper,* 189 U. S. 154, 23 S. Ct. 633. Something more than a bare assertion that an authority is exercised under the United States is essential to the jurisdiction of this Court. *Millingar v. Hartupec,* 6 Wall. 258. It is stated in 54 *American Jurisprudence,* at p. 886, that the United States Supreme Court is without jurisdiction on certiorari to review holdings of the state court which concern matters of state law and amount at most to alleged erroneous constructions of statutes of a state by its own

courts, citing *Neblett v. Carpenter*, 305 U. S. 297, 59 S. Ct. 170.

In summary, due process was not denied this petitioner. He has not raised any substantial federal question that would require this Court to review this case. The questions herein presented were raised in both the Court of Appeals for the Eighth Appellate District of Ohio and in the Supreme Court of Ohio. The Court of Appeals affirmed the judgment of the trial court. The Ohio Supreme Court refused to certify and review. The decisions of the state courts were based on the applicable state law. There is, therefore, no substantial federal question involved. Consequently this Court has no jurisdiction to review this case and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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END